A **SUBRAMANIAM GOPAL**

v.

PP

B HIGH COURT MALAYA, TEMERLOH
AKHTAR TAHIR JC
[CRIMINAL REVISION NO: 43-2-2009]
24 NOVEMBER 2009

C ***CRIMINAL PROCEDURE:*** *Prosecution - Powers to prosecute - Conduct of - Institution of prosecution by local authority against operator of mini market/grocery store without licence - Whether disregarding powers of Attorney General conferred by Federal Constitution - Whether provision of s. 120 Local Government Act 1976 ultra vires provision of art. 145(3)*
D *Federal Constitution*

CONSTITUTIONAL LAW: *Public prosecutor - Powers to prosecute - Prosecution - Conduct of - Institution of prosecution by local authority against operator of mini market/grocery store without licence - Whether*
E *disregarding powers of Attorney General conferred by Federal Constitution - Whether provision of s. 120 Local Government Act 1976 ultra vires provision of art. 145(3) Federal Constitution*

LOCAL GOVERNMENT: *Licence - Local authority - Prosecution instituted by local authority against operator of mini market/grocery store*
F *without licence - Whether disregarding powers of Attorney General conferred by Federal Constitution - Whether provision of s. 120 Local Government Act 1976 ultra vires provision of art. 145(3) Federal Constitution*

G The accused brought this case to the High Court by way of revision seeking to reverse the learned magistrate's ruling on a preliminary objection. The charges against the accused was for running a mini market and grocery store without a licence, an offence under s. 2 of the Local Government Act 1976. The crux of
H the objection herein was the institution of prosecution by the Majlis Perbandaran Temerloh, thereby disregarding the powers of the Attorney General to institute prosecution conferred by the Federal Constitution. Learned counsel for the accused contended that the provision of s. 120 Local Government Act is *ultra vires* the
I provisions of art. 145(3) of the Federal Constitution which gives the sole and absolute power of the Attorney General to institute prosecution.

Held (discharging the accused not amounting to acquittal):

(1) Unlike the delegation of powers to conduct prosecution which for purposes of expediency had been allowed and that too with the express authorisation and by virtue of the amendment of the law, delegation of institution of prosecution should not be allowed. (para 12)

(2) The Federal Constitution does provide exceptions to the powers of the Attorney General, the exceptions being the Syariah Courts, Native Courts and Court Martial. If the drafters of the Constitutions had other exceptions in mind they would have expressly stated that as well. (para 18)

(3) From the reading of s. 120 Local Government Act 1976 as it stands, a parallel power is given to the local authority to institute prosecution and this clearly contravenes art. 145(3) of the Federal Constitution and therefore making the provision null and void. (para 20)

(4) The absence of authorisation in writing by the Public Prosecutor consenting to the prosecution being initiated and compounded by the fact that the prosecuting officer did not have any written authorisation to prosecute indicated that the Public Prosecutor was neither aware nor consented to the prosecution in this case. (para 21)

Case(s) referred to:
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Nguang Chan Sdn Bhd v. PP [2001] 2 CLJ 16 CA ***(refd)***
Pai San & Ors v. PP [2002] 4 CLJ 547 CA ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 377
Federal Constitution, art. 145(3)
Local Government Act 1976, s. 120
Streets, Drainage and Building Act 1974, s. 123

For the applicant - Dato' M Ramachelvam; M/s Rama-Rozi & Assoc
For the respondent - Mohd Najmi Daud DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Akhtar Tahir JC:

[1] This case was brought to the High Court by way of revision seeking to reverse the learned magistrate's ruling on a preliminary objection raised by the learned defence counsel for the accused.

[2] From the records of the magistrate's court Temerloh the accused was first charged in the court on 31 January 2008 and the charges against the accused were as follows:

> Pertuduhan:
>
> (Saman No: 86-416 Tahun 2006)
>
> Bahawa kamu pada 18/4/2006 jam 10.00 pagi di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah didapati kamu telah menjalankan perniagaan kedai runcit tanpa lesen.
>
> Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976, Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Temerloh) 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.
>
> (Saman No: 86-417 Tahun 2006)
>
> Bahawa kamu pada 06/6/2006 jam 10.26 pagi di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah di dapati kamu telah menjalankan perniagaan mini market tanpa lesen.
>
> Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976, Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Temerloh) 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.
>
> (Saman No: 86-418 Tahun 2006)
>
> Bahawa kamu pada 10/3/2006 jam 5.30 petang di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah di dapati kamu telah menjalankan perniagaan runcit tanpa lesen.
>
> Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 2, Akta Kerajaan Tempatan, 1976, Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Temerloh) 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.

(Saman No: 86-419 Tahun 2006) A

Bahawa kamu pada 10/3/2006 jam 5.10 petang di No. 10A, Jalan Besar, Lanchang dalam Negeri Pahang telah di dapati kamu telah menjalankan perniagaan barangan runcit tanpa lesen.

Oleh yang demikian, kamu telah melakukan kesalahan di bawah B seksyen 2, Akta Kerajaan Tempatan, 1976, Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Perindustrian (Majlis Daerah Temerloh) 1984 dan boleh dihukum di bawah seksyen 26 Akta yang sama.

[3] It is also clear from the records that throughout the C proceedings in the lower court the prosecution was conducted by the prosecuting officer from the Majlis Perbandaran Temerloh purportedly on behalf of the public prosecutor although no such authorization in writing from the public prosecutor was shown or tendered in court. This clearly contravenes s. 377 of the Criminal D Procedure Code.

[4] However this is not the crux of the objection of the learned defence counsel. Issues on conduct of prosecution in court have been settled by the relevant amendments to the provisions of the E Criminal Procedure Code.

[5] The crux of the objection in this case is the institution of prosecution by the Majlis Perbandaran Temerloh and thereby disregarding the powers of the Attorney General to institute F prosecution conferred by the Federal Constitution.

[6] The difference between Institution of prosecution and conduct of prosecution has been highlighted in at least two cases. The first case being *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180 where Abdoolcader J (as His Lordship then was) stated as follows: G

Institute in Article 145(3) cannot cover the subject-matter of section 418A of the Code, as the Solicitor-General contends. It must necessarily refer to the commencement of criminal proceedings and prosecutions and not to such as have already been instituted and are H pending or to criminal procedure as such. It may well be, as the Solicitor-General submits, that the Public Prosecutor has power, apart from the application of the provisions of sections 417 and 418A of the Code to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary inquiry. This power to so direct would, if exercised, fall squarely I within his discretion to institute and conduct criminal prosecutions

A and proceedings. The position under section 418A of the Code is wholly different as it has no relation to the institution and for that matter the conduct of criminal proceedings but instead clearly and expressly concerns and relates to criminal cases already commenced and pending in the subordinate courts.

B Conduct in Article 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in section 377 of the Code.

[7] The rationale as to why the institution of prosecution is the C sole prerogative of the Attorney General was stated in the case of *Teh Cheng Poh v. PP* [1978] 1 LNS 202 by Lord Diplock as follows:

> Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the D accused. Such a discretion is conferred upon the Attorney General of Malaysia by Article 145(3) of the Constitution, *viz*:
>
> > The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim E court, a native court or a court-martial.
>
> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to F whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another.

G **[8]** Coming to the matter at hand the learned counsel contends that the provision of s. 120 Local Government Act is *ultra vires* the provisions of art. 145(3) of the Federal Constitution which gives the sole and absolute power of the Attorney General to institute prosecution.

H **[9]** For ease of reference the provisions of s. 120 Local Government Act, 1976 is stated here and worded as follows:

> (1) The local authority may direct any prosecution for any offence under this Act or any by-law, rule or regulation and shall pay I such expenses as may be incurred in such prosecution.

[10] Whereas art. 145(3) of the Federal Constitution reads as follows: A

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial. B

[11] The first point that comes to mind is whether the power to institute prosecution can or should be allowed to be delegated keeping in mind what was stated by Lord Diplock that to institute prosecution involves a thought process which should be exercised C only by persons deemed fit to exercise such a process. The Supreme Law of the land has thought it fit that such exercise be carried out only by the Attorney General and by extension perhaps his officers who form the Attorney General's Chambers.

D

[12] Unlike the delegation of powers to conduct prosecution which for purposes of expediency has been allowed and that too with the express authorisation and by virtue of the amendment of the law, delegation of institution of prosecution should not in my mind be allowed. The same sentiments are shared in the decisions in a E number of cases.

[13] In the case of *Nguang Chan Sdn Bhd v. PP* [2001] 2 CLJ 16 Lamin PCA stated as follows at p. 30:

> That is all that is required to be said about the proceedings. F However by lodging a complaint as was done by the assistant controller, did not help to salvage the case in any way. By so doing it could be said that he did institute proceedings. However whatever action he took would still be under the supervision of the controller (s. 26(2)(j) of the Act which would be 'subject to the general direction and control of the Minister' and therefore in direct conflict G with art. 145(3) of the Constitution and to that extent the said provision would be struck down as null and void (art. 4(1) of the Constitution)

[14] In the case of *Pai San & Ors v. PP* [2002] 4 CLJ 547 Abdul H Hamid Mohamad JCA (as his Lordship then was) stated as follows:

> In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a proceeding for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested I in the Public Prosecutor by art. 145(3) of the Federal Constitution.

A Any authorization given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorized is void. However, so long as the power given to another person is subject to the powers of the Public Prosecutor under art. 145(3) of the Federal Constitution, it is valid.

B **[15]** In the case of *Long Samat & Ors v. PP* [1974] 1 LNS 80 Suffian LP stated as follows:

On independence the Federal Constitution came into force, and clause (3) of its Article 145 (as amended) provided:

C > The Attorney-General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.

D In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to E institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Oil home's speech at pp. 32-3 in *Smedleys Ltd. v. Breed*). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a F less serious nature.

Anyone who is dissatisfied with the Attorney-general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, G should seek his remedy elsewhere, but not in the courts.

[16] Parliament itself has thought it fit to amend the laws to bring it in line with art. 145(3) of the Federal Constitution. One such law is the Streets, Drainage and Building Act which coincidentally also H falls under the purview of the Town Council. Section 123 of the Streets, Drainage and Building Act 1974 after amendment now read as follows:

No prosecution for an offence under this Act or any by-law made there under shall be instituted except by or with the written consent I of the Public Prosecutor.

[17] Another Act, the Environmental Quality Act the provision relating to prosecution after amendment read as follows:

> No prosecution shall be instituted for an offence under this Act or regulations made there under without the consent in writing of the Public Prosecutor.

[18] There are views that if the intention of the Federal Constitution was to give sole discretion to the Attorney General it would have been expressly stated by using words 'sole' or 'only'. To my mind this views are untenable because the Constitution does provide exceptions to the powers of the Attorney General, the exceptions being the Syariah Courts, Native Courts and Court Martial. If the drafters of the Constitutions had other exceptions in mind they would have expressly stated that as well.

[19] On arguments that if all offences however minor or petty were to be referred to the Attorney General, the Attorney General would be deluged with all sort of cases and he would not be able to cope. My view is that the principles of criminal justice should not and cannot be sacrificed for the sake of expediency. Any offence however minor is capable of taking away the liberties and rights of a person and must be viewed seriously.

[20] It is clear from the reading of s. 120 Local Government Act as it stands now, a parallel power is given to the local authority to institute prosecution and this clearly contravenes art. 145(3) of the Federal Constitution and therefore making the provision null and void.

[21] In this case the absence of any authorisation in writing by the public prosecutor consenting to the prosecution being initiated and compounded by the fact that the prosecuting officer did not have any written authorisation to prosecute indicates to me that the public prosecutor was neither aware nor consented to the prosecution in this case. I therefore discharged the accused not amounting to acquittal of all the charges against him.